NO. 92-515

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STATE OF WISCONSIN,

Petitioner,

vs.

TODD MITCHELL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND THE OHIO, FLORIDA, MISSOURI AND NEW YORK STATE ASSOCIATIONS OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

I. DOES THE GOVERNMENT HAVE THE POWER TO REGULATE THE THOUGHT OF THE INDIVIDUAL?

II. IS A SENTENCE ENHANCEMENT STATUTE WHICH REQUIRES PROOF OF BOTH AN ILLEGAL ACT AND PRIVILEGED THOUGHT OR SPEECH UNCONSTITUTIONAL AS A VIOLATION OF THE FIRST AMENDMENT AND, THEREFORE, VOID?

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INTEREST OF AMICI CURIAE

The National Association of Criminal Defense Lawyers (hereinafter NACDL) is a District of Columbia nonprofit corporation whose membership is comprised of more than 5,000 lawyers and 25,000 affiliate members who are citizens of every state. Members serve in positions bringing them into daily contact with the criminal justice system as advocates, law professors, or judges of the state or federal courts. The NACDL is the only national bar organization working on behalf of public and private defense lawyers. The American Bar Association recognizes the NACDL as an affiliated organization and awards it full representation in the ABA House of Delegates. The NACDL is dedicated to the preservation and improvement of our adversary system of justice.

The Ohio, Florida, Missouri and New York State Associations of Criminal Defense Lawyers are statewide organizations of attorneys practicing primarily in the field of criminal defense law. The organizations are affiliated with the NACDL and have been formed for charitable, scientific and educational purposes including the proper administration of justice and research in the field of criminal defense law. The membership of these organizations includes both private practitioners and public defenders many of whom have served as prosecutors.

Amici believe that the precious constitutional rights of the people must be jealously guarded against encroachment by the government, for a right once lost is never to be regained. The case at bar is an extraordinary one. The state seeks dominion over thought itself. The people have not delegated this authority to the state. It is simply not part of our social compact with government. This remains true even though the majority finds the particular thoughts at issue politically incorrect and unworthy of protection.

The parties have consented to the filing of this brief of *Amici Curiae* by letters filed with the Clerk.

SUMMARY OF THE ARGUMENT

The people have not granted government the authority to regulate or control thought. Thought, the core value protected by the First Amendment's freedom of speech clause, is absolutely protected and any attempt to regulate it is void. This is true even where the proposed regulation is aimed at the thoughts of a criminal.

Wisconsin's sentence enhancement statute attempts to evade this logic by use of the "intentional selection" language. The sentence is not enhanced because of the offender's thoughts, so the argument goes, but rather it is enhanced because the offender "intentionally selects" the victim because of the victim's race. However, all victims are selected intentionally. Criminal law traditionally defines several types of *mens rea*. The prohibited conduct must be purposeful, knowing, reckless or criminally negligent in order to constitute a crime. But this is insufficient under the Wisconsin statute to trigger sentence enhancement. In addition, the state must prove the thought or motive behind the intent. Thus, protected thought is singled out for punishment at a higher level than the same criminal act and intent without proof of thought or motive. This the government may not do.

Although this argument may be framed in traditional First Amendment language of overbreadth or infringement upon protected speech, it is in its simplest form more fundamental than that. The state of Wisconsin has attempted to usurp a power not granted it by its social compact with the people. To the extent that this fundamental truth manifests itself in the federal constitution through the First Amendment, the law is void as an abridgement of the freedom of speech.

ARGUMENT:

THE GOVERNMENT HAS NO POWER TO REGULATE THOUGHT. WHERE A SENTENCE ENHANCEMENT STATUTE REQUIRES PROOF OF BOTH AN ILLEGAL ACT AND PRIVILEGED THOUGHT OR SPEECH IT IS UNCONSTITUTIONAL AS A VIOLATION OF THE FIRST AMENDMENT AND, THEREFORE, VOID.

> *"Every opinion may be tolerated where reason is left free to combat it."*

Thomas Jefferson, First Inaugural Address, March 4, 1801.

The substantial constitutional question in this case is whether government may regulate thought. The Wisconsin penalty enhancement statute (Wis. Stat. § 939.645) makes relevant the thoughts of the individual to the extent that they occur and are somehow related to the predicate crime. The phrase "intentionally selects the person . . . because of the race, (etc.) of that person" suggests a cause and effect relationship between the thought and the predicate offense.

Proof of the defendant's conduct alone is insufficient to trigger the sentence enhancement statute. Therefore, this statute makes thought with a particular content an element of the criminal offense.[1] The conduct associated with the offense is already prohibited. This is not contested. The dispute is whether it is constitutional to prohibit conduct plus thought. It is not.

The State of Wisconsin has a legitimate interest in protecting the health, safety, and welfare of the people, but it has no

[1] Of course, all crimes (with the exception of strict liability offenses) contain a mental element. But the traditional *mens rea*, such as purposeful or intentional action, does not require proof of the content of thought. The Wisconsin penalty enhancement statute makes the content of the thought an element of the statute, thereby discriminating between various motivations.

interest in controlling their thoughts. This Court has long held that freedom of thought enjoys the same constitutional guarantee as freedom of conscience, and that in neither case do the States enjoy the power to regulate:

> The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust in government to separate the true from the false for us.

Thomas v. *Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). *See also*, *State Board of Education* v. *Barnette*, 319 U.S. 624 (1943); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Myer* v. *Nebraska*, 262 U.S. 390 (1923); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).

The words of Thomas Jefferson give voice to this bedrock principle. It is a principle which remains valid even when the particular thought is offensive and not "politically correct". *See Terminiello* v. *Chicago*, 337 U.S. 1, 4-5 (1949). Common beliefs bind the majority of our society together. But our constitutional democracy is designed to protect the rights of a minority, indeed even a single individual, against majoritarian oppression in certain fundamental areas. The most fundamental protection is the inherent right of free and unfettered thought.

The statute reads in relevant part:

> If a person does all of the following, the penalties for the underlying crime are increased . . . (a) commits a crime . . . (b) Intentionally selects the person against whom the crime under para. (a) is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person. . . .

Wis. Stat. § 939.645 (1989-90).

Wisconsin had already passed laws which govern every aspect of the conduct involved in this case. Proof of one of these crimes is necessary for, but insufficient to invoke the additional penalties, provided by the statute. In addition to the conduct, the State of Wisconsin was required to prove that respondent held a thought with a particular content in his mind when the predicate offense was committed. It is proof of this second element which triggers the enhancement statute. Penalties for crimes committed while the defendant is possessed of an offending thought or belief is double that where the proof on this issue fails.[2] Where the proof does not fail, the statute specifically punishes the thought harbored by the defendant at the time of the offense.

A fair reading of this statute is that the selection of the victim of the offense must be motivated by or "because of" the victim's race, etc. The thoughts of the offender are the cause and the underlying crime is the effect. Both cause and effect are essential elements of this statute. Any other reading would create character evidence problems under Rule 404(B), Wisconsin Rules of Evidence.[3] However, this offends the First and Fourteenth Amendments to the United States Constitution because it invades the cognate right of the individual to think whatever he or she pleases. *See Aptheker* v. *The*

[2] It has been suggested that because this statute does not create a separate offense but simply serves to enhance the punishment of acts which are already illegal it does not offend the constitution. This is a matter of constitutional insignificance, however, as the sentence enhancer remains a legislative attempt to regulate or control thought. *See United States* v. *Lemon*, 723 F.2d 922, 938 (D.C. Cir. 1983) ("A sentence based to any degree on activity or beliefs protected by the first amendment is constitutionally invalid"). *United States* v. *Bangret*, 645 F.2d 1297, 1305 (8th Cir. 1981) ("Consideration of political beliefs, as distinguished from criminal activity, would clearly be impermissible in determining defendant's sentences, because it would impair the rights of the defendants under the First Amendment [. . .].").

[3] Evidence of a defendant's bigotry, for example, is inadmissible to prove bad character and, therefore, action in conformity with bad character.

Secretary of State, 378 U.S. 500, 517 (1964) (Black, J., concurring). *See also Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U.S. 1, 137 (1961) (Black, J., dissenting).

If the state can do this at all then it can do it at will. If bigotry can be singled out for higher punishment, then so can political party affiliation, culinary preference, or any other aspect of thought or belief. Petitioner and their *amici* fail to explain why these categories could not be appended to the "because of" portion of the statute immediately following "national origin or ancestry". Assume, by way of example, that the statute included artistic preference immediately after ancestry, and that the crime was committed against an impressionist painter. The state, put to its proof, would show that the defendant intentionally selected his victim because, being a realist he despised the impressionist school of art. Acting on his belief makes him guilty of the assault, but the belief itself doubles his punishment. Indeed, under the Wisconsin statute, he would be punished at the higher level even if he were mistaken about the victim's artistic preference.

However, the government has only such power as the people have conferred upon it. The people of the State of Wisconsin have never conferred the power of thought control upon the Wisconsin legislature. To the contrary, this right has been specifically reserved by the people. *See, e.g.*, Article I, Section 1 of the Wisconsin Constitution ("All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to serve these rights, governments are instituted, deriving their just powers from the consent of the governed.") *See also* Amendments IX and X, United States Constituition. The state simply may not regulate an area wherein it has no interest.[4] Thought is not merely a cognate or penumbral right

[4] Petitioner has stated that "the State legislature has legitimate reasons for believing that many discrimination crimes deserve higher penalties." Petitioner's Brief at 9. Petitioner then continues, oxymoronically, "[t]he law

protected by the First Amendment. It is a right even more fundamental than speech or association. Although speech and association are given constitutional ink, they are merely the vehicles through which thought is transmitted.

The Wisconsin legislature has sought to penalize thought with a particular content. To this extent the case at bar is distinguishable from *R.A.V.* v. *City of St. Paul, Minnesota*, ___ U.S. ___, 112 S.Ct. 2538 (1992). There is no question that conduct can be and already has been sanctioned. However the Constitution requires a cold neutrality from the legislature where it seeks to govern expressive conduct. *See Texas* v. *Johnson*, 491 U.S. 397, 406 (1989); *R.A.V., supra*, ___ U.S at ___, 112 S.Ct. at 2542. Each person and every group in society is entitled to the equal protection of the laws, no more and no less. When the Wisconsin legislature attempts to protect one group in society from the thoughts *in addition to* the conduct of another group, it violates this principle of neutrality. It does at once too much and too little.

It does too much when a precedent is set allowing criminal sanctions against thoughts which are unpopular under contemporary values. Values may change, but once the government has usurped a power from the people it never gives it back.

And it does too little. Criminal laws do not prevent crime. Criminal laws punish, but do not change behavior. The suggestion that this law is aimed at preventing or reducing racial, religious or ethnic violence is at best disingenuous. It

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does not violate the First Amendment because these reasons have nothing to do with punishing beliefs." Id. *Amici* for respondent respectfully disagree. The state has *no* legitimate reason for believing that discrimination crimes deserve higher penalties than the identical crime committed with some other motivation. The fact that a majority of the legislature disapprove of Mr. Mitchell's anger toward whites does not mean that the government can seek to extinguish such thoughts. The Wisconsin Legislature is entitled to express its outrage at those who commit racially motivated crimes, but not by punishing the thought. Simply put, government may not directly regulate the thoughts of the people in any manner.

will do no such thing. Not a single act of ethnic violence or racial intimidation will be thwarted. This law was enacted for political reasons. It allows legislators and prosecutors to posture before the public. Such laws fool the electorate into believing that politicians are addressing themselves to the underlying social problems which breed intolerance when, in fact, they are doing nothing at all.

Nor does it matter that the "interest" of the state is characterized as "compelling". This Court has struck down laws where the government's interest is arguably at its zenith, *e.g.*, criminal syndication statutes designed to protect the government against violent overthrow or revolution. The rationale of these decisions recommends itself here:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press, and free assembly in order to maintain the opportunity for free political discussion of the people and that changes if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

De Jonge v. *Oregon*, 299 U.S. 353, 365 (1937).

It has been suggested that the statute does not regulate thought or speech in an impermissible fashion[5] because the

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[5] Of course, the power of government to regulate speech is severely limited. Speech can be regulated where it is "brigaded with action" such as shouting fire in a crowded theater. See *Speiser* v. *Randall*, 357 U.S. 513, 536-37 (1958) (Douglas, J., concurring). But a prosecution for inducing a panic is based upon the conduct of the defendant and not the content of his thought. Applying this analogy to the case *sub judice*, the prosecution would be required to prove that the defendant shouted fire in the crowded theater because he hated the patrons of the theater (i.e. intentionally selected them because of their race, etc.). This crosses the line. Government may not directly regulate the content of an individual's thoughts even if the thought is "brigaded with action". *Texas* v. *Johnson*, *supra*.

sanction operates only in concert with the conduct embodied in the predicate offense. However, this argument is flawed. Where the criminal sanction is based on a mix, partially for what is thought or spoken and partially for what is illegally done, the conviction cannot stand. *See Stromberg* v. *California*, 283 U.S. 359, 367-68 (1931); *Williams* v. *North Carolina*, 317 U.S. 287, 292 (1942); *Street* v. *New York*, 394 U.S. 576, 586-87 (1969). This Court has often noted that regulations based on the content of speech or expressive conduct is presumptively invalid. *Simon & Schuster, Inc.* v. *Members of N.Y. State Crime Victims Board*, 502 U.S. ____, ____, 112 S.Ct. 501, 508, 116 L.Ed.2d 476, ____ (1991); *Consolidated Edison Co. of N.Y.* v. *Public Serv. Comm'n. of N.Y.*, 447 U.S. 530, 536 (1980); *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972).

Street v. *New York*, *supra*, is instructive:

> [. . .] we conclude that the case is governed by the rule of *Stromberg*, and that appellant's conviction must be set aside if we find that it could have been based solely upon his words and that a conviction resting on such a basis would be unconstitutional [. . .]. Moreover, even assuming that the record precludes the inference that appellant's conviction might have been based *solely* on his words, we are still bound to reverse if the conviction could have been based upon *both* his words and his act.

394 U.S., at 586-87 (emphasis added).

A conviction under the Wisconsin statute requires — by definition and design — proof of both an illegal act and privileged thought.[6] Protected speech is implicated as it will

[6] Moreover, the thought must be of a certain and particular content. Intentional selection of the victim because of the victim's race or religion is prohibited whereas intentional selection because of the victims politics, philosophy or taste in art is not.

be the most common form the state's evidence of the defendant's bigotry will take. The statute is patently unconstitutional because it attempts to convert otherwise constitutionally protected thought into an element of the enhancement law. The statute is overbroad *by design*.

It takes little imagination to foresee the harm that could come from allowing thought control so long as it is allied with "criminal conduct". One of the results of the so called war against crime has been the explosive growth in the reach of criminal law, particularly in the area of conspiracy. All that is required to prove a conspiracy is a criminal agreement to which the defendant is a party. One may well be held accountable even where he or she takes no other act in furtherance of the conspiracy. In such a case the defendant's "thought" would be "brigaded" only with the action of a co-conspirator. Furthermore, such an action may have occurred before the defendant even became part of the conspiracy. In fact, this could have occurred in the case at bar. The defendant clearly formed a conspiracy with the others in his gang to assault the victim. If one of the others had actually assaulted him a day later, Mr. Mitchell could have been charged, tried and convicted as a co-conspirator based upon his agreement to join in the criminal conspiracy standing alone.

Even if it were conceded that the state has a legitimate and compelling interest in controlling thought, a showing would be required that the means employed are the narrowest available. *R.A.V.*, *supra*, ____ U.S. at ____, 112 S.Ct. at 2549-50. In this case they are not. There is no evidence whatsoever that this statute will reduce ethnic or racial crime. It seems clear, though, that the statute can and will be used to enforce a conformity of thought. *Amici* question the wisdom of seeking social tranquility through thought control. Even if it works the cure may be worse than the affliction.

This is not the first time that state legislatures have attempted to regulate what the people think or believe. But the

power to regulate is the power to punish and this knowledge can chill the exercise of free speech. Wrote Justice William O. Douglas:

> One's beliefs have long been thought to be sanctuaries which government could not invade. *Barenblatt* is one example of the ease with which that sanctuary can be violated. The line drawn by the Court between the criminal act of being an "active Communist" and the innocent act of being a nominal or inactive Communist mark the difference only between deep and abiding belief and casual or uncertain belief. ***But I think that all matters of belief are beyond the reach of subpoenas or the probings of investigators.*** That is why the invasions of privacy made by investigating committees were notoriously unconstitutional. That is the deep-seated fault in the infamous loyalty-security hearings which, since 1947 when President Truman launched them, have processed 20,000,000 men and women. Those hearings were primarily concerned with one's thoughts, ideas, beliefs, and convictions. They were the most blatant violations of the First Amendment we have ever known. ***The line between what is permissible and not subject to control and what may be made impermissible and subject to regulation is the line between ideas and overt acts.*** The example usually given by those who would punish speech is the case of one who falsely shouts fire in a crowded theater. This is, however, a classic case where speech is brigaded with action. See *Speiser* v. *Randall*, 357 U.S. 513, 536-37, 78 S. Ct. 1332, 1346, 2 L. Ed. 2d 1460 (Douglass, J., concurring). They are indeed inseparable and a prosecution-can be launched for the overt acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution. Certainly there is no constitutional line between advocacy of abstract ideas as in *Yates* and advocacy of political action as in *Scales*. The quality of

> advocacy turns on the depth of the conviction; and ***government has no power to invade that sanctuary of belief and conscience.***

Brandenburg v. *Ohio*, 395 U.S. 444, 456-57 (1969) (Douglas, J., concurring) (emphasis added).

CONCLUSION

Judge Learned Hand wrote that the First Amendment, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and will always be folly; but we have staked upon it our all." *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

Only those among us of mean spirit will advocate racism and bigotry. But our system of government does not allow the state to invoke the police power to punish the thoughts and beliefs of any citizen, no matter how reprehensible. Nor may government single out thought of a particular content for punishment even when it is brigaged with criminal action. We must place our faith in our ability to grow and mature as a society. We must hope that the evolving standards of decency will, one day, lead to the extinction of abhorrent attitudes and undesirable beliefs. But this must be a nautral evolution. It can not be achieved through legislative fiat:

> Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.

West Virginia State Board of Education v. *Barnette*, 319 U.S. 671 (1943) (Frankfurter, J., dissenting).

Conduct can be punished. It is. Thought may not. Yet this is what Wisconsin would do through § 939.651. In its attempt to punish bigoted thought Wisconsin has exceeded the power granted it by the people. In its attempt to usurp this power the Wisconsin legisiature has violated the social compact under which the people consent to be governed. Governmental cries of compeliing need and necessity are unmoving. We have heard such cries before. They have been evoked, for example, to justify internment of Japanese-Americans during the second World War — cries that this Court heeded to our collective shame as a constitutional democracy. *See, e.g., Korematsu* v. *United States*, 323 U.S. 214 (1944). The same mistake should not be made here where the compelling necessity is simply to enforce that which is politically correct at the moment. The decision of the Supreme Court of Wisconsin should be affirmed.

Respectfully Submitted,

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